

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court Of The United States

No. **75-912**

Johnnie Slingerland *Petitioner*

V.

United States of America *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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IN THE
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Johnnie Slingerland *Petitioner*

V.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above - Entitled case on October 30, 1975.

JURISDICTION

The Judgment of the Circuit Court of Appeals was returned on October 30, 1975. An extension of time for filing the instant Petition was granted on November 26, 1975, extending to December 29, 1975, the time for filing the instant Petition. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Whether the evidence presented against Petitioner was sufficient to overcome Petitioner's presumption of innocence so that Petitioner's constitutional rights afforded by the Fourteenth Amendment to the Constitution of the United States were fully protected.

STATUTE INVOLVED

The statutory provisions involved are 18 U.S.C. 371, 18 U.S.C. 152. They are printed in Appendix A, *infra*, P.P. .

STATEMENT

An Involuntary Petition in Bankruptcy was filed against Factory Surplus and Freight Sales, Johnnie Lee Slingerland and William Francis Wilson, on May 10, 1974. The jurisdiction of the District Court was invoked because the case in point, 18 U.S.C. 371, arises under Section 152, 18 U.S.C. to-wit: "Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal or other officer of the Court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or . . . "

The Trustee was appointed on June 18, 1974 and proper bond was made. At the time the Petition for Involuntary Bankruptcy was filed, F.S.F.S., Slingerland and Wilson, were in fact still doing business. Creditors

were being paid, bank accounts were still being operated, payrolls were still being met.

Testimony adduced at the trial in District Court was to the effect that General Electric Finance had factored the commercial paper for F.S.F.S. and that a great majority of the accounts were good. General Electric, for no good reason, and without notice, substantially reduced the amount of credit to be extended to F.S.F.S. After persuasion *by Slingerland*, (emphasis added.) General Electric agreed to factor as much as \$10,000.00 of commercial paper each month. At the time of this agreement, F.S.F.S. had already factored this amount and this was approximately the tenth of the month. The effect, therefore, was to eliminate any further sales, except cash transactions, for the particular month and to substantially reduce any future commercial transactions on the part of F.S.F.S. In effect, F.S.F.S. was put out of business, *and for no valid reason nor was it due to any action on the part of Petitioner*. (Emphasis added). The point is also made here that Petitioner offered to put up a substantial amount *of his own money* (emphasis added) as an inducement for General Electric to maintain their level of credit.

In order to save F.S.F.S., Petitioner began selling furniture to individuals by pieces and lots. As money was received, it was deposited and creditors were paid. In fact, just shortly prior to the filing of the Involuntary Bankruptcy by three or four creditors, one of the creditors who filed had been paid by Petitioner.

Trial was held in District Court, by Jury. The government case consisted of voluminous documents and over sixty witnesses, mostly dealers who had done business with Petitioner and F.S.F.S. *Not one*, (emphasis added), witness of any creditable status testified as to any wrong doing on the part of Petitioner. In fact, many testified as to Petitioner's good credit and business ability and stated they would do business with Petitioner again. One witness, Wilson, testified that a conspiracy had originally been agreed to and carried out. This witness admitted to prior acts of wrongdoing that involved perjury, intimidating Government witnesses, stealing, and that the Government was going to help him not only in the instant case but also in other federal jurisdictions as well as possible state charges.

On appeal to the Eighth Circuit, Petitioner's counsel had barely three minutes to plead Petitioner's case. The three judge panel upheld Petitioner's conviction on the Eighth Circuit's policy that a conspirator can be convicted solely on the *uncorroborated testimony* of a *co-conspirator* (emphasis added). This, says Petitioner, is contrary to the spirit of due process and does deprive Petitioner of his full rights under the 14th Amendment to the Constitution of the United States.

In the instant case, the testimony of Wilson is totally uncorroborated. His testimony was as self-serving as any testimony could possibly have been. Wilson even exonerated two others, Paul Jarnigan and James Micciche, one of whom was related to Wilson and the Eighth Circuit reversed the convictions of Jarnigan and Micciche.

REASONS FOR GRANTING THE WRIT

I.

This trial was very complicated, long, drawn out, very difficult for legal practitioners to comprehend, much let alone a jury of laymen.

"The comprehensiveness and indefiniteness of the offense of conspiracy has made an exact definition a very difficult one." *Commonwealth v. Donahoe*, 250 Ky 343, 347, 63 S.W.2d 3, 5 (1933). "It (conspiracy) almost defies definition." - Mr. Justice Jackson in *Krulewitch v. U.S.*, 336 U.S. 440, 446, 69 S. Ct. 716, 719, 720 (1949).

Due process demands that one receive a fair, impartial and complete understanding of the charges against him. As stated by the learned Justice Jackson, *Supra.*, conspiracy practically defies definition. In the case of Petitioner, it is clear that he did not receive a fair and intelligent understanding of the facts by this particular jury.

II.

In *Hyde v. U.S.*, 225 U.S. 347, 32 S. Ct. 793 (1912) the Court held that overt actions done are a part of the conspiracy. What overt actions done by Petitioner suggest that they, the acts, are part of a conspiracy to defraud? The overt act of convincing General Electric to increase the amount of commercial paper General Electric would factor? The overt act of offering to put up

a substantial amount of his own money? The overt act of selling furniture by pieces and lot, at reasonable prices, and paying creditors?

There must be *more than* (emphasis added) an agreement. 18 U.S.C.A., Section 371; West's Ann. Cal. Pen. Code, Section 184. Also, *Hyde v. U.S.*, 225 U.S. 347, 32 S. Ct. 793 (1912)

III.

The due process Clause of the 14th Amendment is not limited to those specific guarantees spelled out in the Bill of Rights but rather contains protection against practices and policies which may fall short of fundamental fairness without running afoul of a specific provision. *In re Winship*, 397 U.S. 358, 377 (1970). What is fair or reasonable about summarily holding that a conspirator can be convicted on the total uncorroborated testimony of an alleged co-conspirator? Even most states hold that without corroborating evidence one cannot be convicted on the uncorroborated testimony of a co-defendant. Surely, if State Courts can recognize the damages in this type of criminal conviction, our Federal Judiciary should be even more cognizant of the protection of individuals in this sort of criminal prosecution.

IV.

The decision of the Court of Appeals was given after a review of the transcript, five volumes, and oral

argument that consisted of barely three minutes by Petitioner's counsel. Is this adequate to protect Petitioner's rights and also to guarantee Petitioner the degree of fairness to which he is entitled? Hardly.

V.

It has been said by the learned Professor Perkins, "the substantive acts of one conspirator in *furtherance of the conspiracy*, must be imputed to his co-conspirators insofar as *they were members of the conspiracy at the time the acts were committed*." (Emphasis added). Perkins, *The Act of One Conspirator*, 26 Hastings L.J. 337-359 (1974).

Taking the record as a whole, what substantive acts of Petitioner, in furtherance of a conspiracy, were imputed to co-conspirators at the time the acts were done? What acts at all were done in furtherance of a conspiracy to defraud creditors?

If we are to hold the acts done by Petitioner in the instant case as those acts of a conspirator in furtherance to defraud creditors, then our entire economic structure, as it relates to business of this nature, might just as well be done away with. It is a well settled principle of business, in the surplus and salvage trade, that factoring of commercial paper is essential if that business is to continue. Without it, there can be no trade of this nature. What, for example, would happen to General

Motor Corporation if suddenly their credit line was substantially reduced? Would you then hold the corporate officers liable for conspiracy to defraud creditors if steps were taken to sell merchandise, for reasonable prices, to maintain the business?

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

1. 18 U.S.C. Sect. 371—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

2. 18 U.S.C. Sect. 152—Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FILED

OCT. 30, 1975

Robert C. Tucker
Clerk

No. 75-1224

September Term, 1975

United States of America,

Appellee,

vs.

Appeal from the United States
District Court for the

Johnnie Lee Slingerland, Eastern District of Arkansas

Appellant,

Paul Ray Jarnigan,
William Francis Wilson,
Frank Douglas Ward,
Joseph Micciche, Sr.

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Arkansas and typewritten briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby affirmed.

October 30, 1975

PROCEEDINGS IN THE UNITED STATES
COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

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Nos. 75-911 and 75-912

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In the Supreme Court of the United States

OCTOBER TERM, 1975

FRANK DOUGLAS WARD, PETITIONER

v.

UNITED STATES OF AMERICA

JOHNNIE SLINGERLAND, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.



In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-911

FRANK DOUGLAS WARD, PETITIONER

v.

UNITED STATES OF AMERICA

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JOHNNIE SLINGERLAND, PETITIONER

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UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the evidence was insufficient to sustain their convictions.

After a jury trial in the United States District Court for the Eastern District of Arkansas, petitioners, together with Paul Ray Jarnigan and Joseph Micciche, Sr., were convicted on one count of conspiring knowingly and fraudulently to transfer and conceal assets in contemplation of a bankruptcy proceeding, in violation of 18 U.S.C. 152 and

371.¹ Petitioner Ward was sentenced to four years' imprisonment and petitioner Slingerland to five years' imprisonment. The court of appeals affirmed (Pet. App.).

1. Government witness William Wilson, who pleaded guilty, testified that in October 1973 he and petitioners expressly agreed to defraud creditors by establishing good credit, ordering a large inventory, disposing of that inventory for whatever it would bring, and then disappearing (Tr. 262-266).² In December 1973, pursuant to the scheme, Factory Surplus and Freight Sales (FSFS), a furniture store, was established (Tr. 266-268). In April 1974, after experiencing an increasing business in inexpensive furniture sold at very low prices, a huge inventory began to arrive at FSFS. Much of the inventory was stored at locations rented on a short-term basis. The merchandise was then trucked to auction houses and sold at prices substantially below wholesale (Tr. 270-284). Many trucks were rented for this purpose. Wilson testified that one truck was purchased and title placed in petitioner Ward to protect it from bankruptcy proceedings (Tr. 268-269). Shortly before FSFS closed, an employee drove petitioner Slingerland to a branch of the bank used for the FSFS account to draw out its money.³

By April 30, 1974, the FSFS store was completely emptied of furniture (Tr. 63). On that day petitioner Slingerland, the nominal proprietor of FSFS, reported to the police that he had been robbed of \$68,000 in cash (Tr. 270, 274, 389-394, 397-398).⁴ The police asked him for

¹The court of appeals reversed the convictions of two co-defendants Jarnigan and Micciche, on the ground that the evidence was insufficient to show their participation in the conspiracy.

²"Tr." designates the transcript of the trial in the district court.

³Slingerland asked the employee to drive him so that the firm's creditors would not see him leave (Tr. 436).

⁴Prior to the alleged robbery, witness Wilson told another witness that such a robbery would be claimed to account for FSFS's missing assets.

a statement of the circumstances of the robbery, which Slingerland never provided. He explained at trial that he failed to provide the police with the statement because he did not like their attitude (Tr. 808).

On May 10, 1974, creditors of Wilson, Slingerland and FSFS filed a petition for involuntary bankruptcy, and a receiver was appointed (Tr. 236). Petitioners, however, proceeded to dispose of FSFS merchandise at public auction. On May 11, 13, and 20, 1974, auctions arranged by Ward were held; petitioner Slingerland was present and assisted Ward at two of the auctions (Tr. 201-202, 204-205). The auctions brought in approximately \$17,000, which Ward shared with Wilson and Slingerland (Tr. 202-203, 276-277). On May 28, 1974, another auction was held at which Slingerland, Ward and Wilson were present; a total of \$17,675.50 was realized and was split among the three (Tr. 277-278, 509-510). An injunction prohibiting petitioner Ward from disposing of assets was issued June 27, 1974 (Tr. 237).

Petitioners testified in their own behalf and denied participating in any fraudulent scheme (Tr. 607-685, 749-825).

2. Viewed in the light most favorable to the government,⁵ the evidence was sufficient to sustain the convictions. As the court of appeals stated (Pet. App. 4):

With respect to Ward and Slingerland, the testimony of witness-Wilson precludes any innocent interpretation of these facts. While it is true that Wilson's character was shown to be less than spotless, it is well settled that "a conviction can rest on the uncorroborated testimony of a co-defendant or accomplice." *United States v. Guy*, 456 F.2d 1157, 1161 (8th Cir.), *cert. denied*, 409 U.S. 896 (1972); *Wood v. United States*, 361 F.2d 802 (8th Cir. 1966). Further, Wilson's testimony was substantially corrob-

⁵*Hamling v. United States*, 418 U.S. 87, 124; *Glasser v. United States*, 360 U.S. 60, 80.

orated. For example, the record shows that Wilson knew that Slingerland was planning a phony robbery some time prior to its occurrence. Other evidence in the record also serves to corroborate this direct testimony of an express conspiracy intended to defraud creditors and frustrate the bankruptcy laws.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

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